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ATTORNEYS FOR USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:
☐ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☒ USA Capital Diversified Trust Deed Fund, LLC
☐ USA First Trust Deed Fund, LLC

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

Chapter 11

Jointly Administered Under
 Case No. BK-S-06-10725-LBR

**RESPONSE TO OBJECTION TO
 NOTICES OF 2004
 EXAMINATIONS, MOTION TO
 QUASH SUBPOENAS AND OR
 FOR PROTECTIVE ORDER AND
 MOTION FOR LIMITATION OF
 RULE 2004 EXAMINATIONS**

**Hearing Date: May 8, 2008
 Hearing Time: 10:30 a.m.**

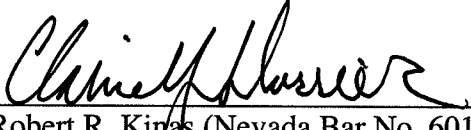
USA Capital Diversified Trust Deed Fund, LLC ("Diversified") hereby files its Response to the *Objection to Notices of 2004 Examinations, Motion to Quash Subpoenas and or for Protective Order and Motion for Limitation of Rule 2004 Examinations* [Docket No. 6176] (the "Motion to Quash") filed by Robert A. Russell ("Russell"), Unser/Central Partners, LLP, Russell/AD Development Group, Interstate Commerce Center, LLC, and AD Albuquerque

1 Development, LLC (collectively, with Russell, the "Russell Entities").

2 This Response is based on the papers and pleadings on file herein, the Memorandum of
3 Points and Authorities attached hereto, and any oral argument the Court may entertain.

4 DATED this 25th day of April, 2008.

5
6 SNELL & WILMER LLP

7
8 By: 
9 Robert R. Kings (Nevada Bar No. 6019)
10 Claire Y. Dossier (Nevada Bar No. 10030)
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19 *Attorneys for USA Capital Diversified Trust Deed Fund,*
20 *LLC*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Diversified continues the uphill battle of collecting and monetizing its assets in order to repay the over \$150 million invested by approximately 1,300 investors. One such asset is a promissory note, the current balance of which exceeds \$825,000. In connection with such effort, Diversified informally sought information and documents from the maker and guarantors of such note. Some information was provided by Russell during a meeting, but the documents he promised to deliver were not. Diversified thereafter incurred the expense of seeking document production and an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (“Rule 2004”). Rather than produce documents, though, the Russell Entities produced the Motion to Quash. Diversified submits that it is seeking information well within the “unfettered and broad” scope of Rule 2004. *See In re GHR Energy Corp.*, 33 B.R. 451, 453 (Bankr. D. Mass. 1983). Specifically, Diversified seeks information related to the promissory note and guaranty, as well as information regarding any additional, currently unknown transactions between the Russell Entities and Diversified. The Court should deny the Motion to Quash, and order the Russell Entities to produce documents and appear for a Rule 2004 examination. Diversified is willing to agree that tax returns produced by the Russell Entities will be held in confidence and not shared with others.

II. BACKGROUND

A. Diversified Is Owed at least \$826,507.47 Under the Note and Guaranty

Diversified entered into a “Promissory Note Secured by Deed of Trust” (the “Note”) as lender, with Interstate Commerce Center, LLC as borrower. A copy of the Note is attached as Exhibit 1 to the Motion to Quash. Russell and Russell/AD Development Group guaranteed the Note. A copy of the “Unconditional Repayment and Completion Guaranty” (the “Guaranty”), executed by Russell individually and as Manager of Russell/AD Development Group, LLC, is attached as Exhibit 2 to the Motion to Quash. The Note is in default, and as of January 31, 2008, Interstate Commerce Center, LLC, Russell/AD Development, Mr. Russell owed Diversified

1 \$826,507.47 pursuant to the Note and Guaranty. A copy of the January 31, 2008 Account
2 Statement for the Note ("Account Statement") is attached hereto as Exhibit A.

3 **B. Russell Repeatedly Promised to Provide Diversified with the Requested**
4 **Information**

5 Six months ago, Russell agreed to provide Diversified with documents related to the Note
6 and Guaranty. See October 23, 2007 email correspondence from Chas Harvick to Robert Russell,
7 attached hereto as Exhibit B. The documents were not provided. Diversified attempted to
8 convince Russell to honor his promise to produce documents, attempting to avoid the cost and
9 bother of having to see the intervention of this Court. See Exhibit B; see also November 12, 2007
10 email correspondence from Chas Harvick to Robert Russell, attached hereto as Exhibit C.
11 Russell responded to the November 12, 2007 letter immediately, stating that he would produce
12 the requested documents "**within the week.**" See November 12, 2007 email correspondence from
13 Robert Russell to Chas Harvick (emphasis added), attached hereto as Exhibit D. Despite that
14 promise made over five months ago, Russell never produced the documents.

15 On December 4, 2007, Diversified again asked Russell about the promised document
16 production. A copy of the December 4, 2007 email correspondence from Chas Harvick to Robert
17 Russell is attached as Exhibit E. Russell did not respond. On December 13, 2007, Diversified
18 once more requested information about the promised documents. A copy of the December 13,
19 2007 email correspondence from Michael Tucker to Robert Russell is attached as Exhibit E.
20 Again, Russell did not respond to such email. Accordingly, Diversified filed the multiple 2004
21 requests at issue, and issued the accompanying subpoenas.

22 **III. ARGUMENT**

23 **A. Rule 2004 Has an "Unfettered and Broad" Scope**

24 Rule 2004's intended scope and use are "unfettered and broad." *In re GHR Energy Corp.*,
25 33 B.R. at 453. "The purpose of such a broad discovery tool is to assist the trustee in revealing
26 the nature and extent of the estate, and to discover assets of the debtor which may have been
27 intentionally or unintentionally concealed." *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28
28 (Bankr. N.D.N.Y. 1996). The Rule states, in pertinent part, as follows:

1 (a) **Examination on Motion.** On motion of any party in interest, the court
2 may order the examination of any entity.

3 (b) **Scope of Examination.** The examination of an entity under this rule or of
4 the debtor under § 343 of the Code may relate only to the **acts, conduct, or**
5 **property or to the liabilities and financial condition of the debtor**, or to any
6 matter which may affect the administration of the debtor's estate, or to the debtor's
7 right to a discharge. . . . the examination may also relate to . . . the source of any
8 money or property acquired or to be acquired by the debtor for purposes of
9 consummating a plan . . . and any other matter relevant to the case or the
10 formulation of the plan.

11 FED. R. BANKR. P. 2004 (emphasis added).

12 **B. The Broad Scope of Rule 2004 Encompasses the Approximately \$825,000**
13 **Debt Owed to Diversified; Additionally, the Russell Entities May Have**
14 **Knowledge Regarding Additional Diversified Assets**

15 The Rule 2004 examination of the Russell Entities will relate to "the acts, conduct, or
16 property or to the liabilities and financial condition of [Diversified and its affiliates], or to any
17 matter which may affect the administration of the debtor's estate" as required by Rule 2004.
18 Interstate Commerce Center, LLC, Russell/AD Development Group and Mr. Russell owe
19 Diversified no less than \$826,507.47 under the Note and Guaranty. *See* Account Statement,
20 Exhibit A. The status of Diversified's outstanding accounts receivable is central to Diversified's
21 "property" and to its "financial condition."

22 Moreover, as the Court is aware, the jointly administered USA Commercial cases have
23 often involved actors in repeat transactions with the various debtors. It is quite possible that
24 Russell and/or other of the Russell Entities were involved in additional, currently unknown,
25 transactions with Diversified. The Russell Entities thus "have knowledge of the debtor's acts,
26 conduct or financial affairs which relate to the bankruptcy proceeding."

27 **C. Limitation on the Use of Tax Returns**

28 Diversified agrees with the Russell Entities that any tax returns produced by the Russell
Entities ought to be kept private. Thus, Diversified is willing to insert into the order denying the
Motion to Quash a requirement that the tax returns produced by the Russell Entities will held in
confidence by Diversified and that the tax returns will not be shared with others.

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///

1 **V. CONCLUSION**

2 The Motion to Quash should be denied. Diversified requests that the Russell Entities be
3 ordered to produce documents and appear for a Rule 2004 examination immediately, with the
4 caveat that tax returns be held in confidence and not be shared with others.
5

6 DATED this 25th day of April, 2008.

7
8 SNELL & WILMER LLP

9
10 By: 

11 Robert R. Kinas (Nevada Bar No. 6019)
12 Claire Y. Dossier (Nevada Bar No. 10030)
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21 *Attorneys for USA Capital Diversified Trust Deed Fund,*
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Snell & Wilmer

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LAS VEGAS, NEVADA 89169
(702) 784-5200

EXHIBIT A

EXHIBIT A

**USA CAPITAL
DIVERSIFIED TRUST DEED FUND**

c/o FTI Consulting, Inc.
Two North Central Avenue, Suite 1200
Phoenix, Arizona 85004

For questions regarding your statement
please contact us at 602.744.7100

Interstate Commerce Center Loan
Bob Russell
Fax: 480-505-4049

Statement Information

Page Count	1
Statement From - To	1/1/2008 - 1/31/2008
Bill Due Date	02/01/2008
Total Amount Due	\$826,507.47

Monthly Billing Summary

Account:					
Current Interest Due		Default Interest	\$113,047.41		
30 Day Late Interest Due		Late Fees			
60 Day Late Interest Due		Legal Fees			
90 Day Late Interest Due		Other Fees			

Account Transaction Detail

Transaction Date	Transaction Type	Beginning Balance	Ending Balance	Transaction Amount
Interest Transactions (Last 90 days)				
10/31/2007	Loan Default Interest			\$13,700.91
11/30/2007	Loan Default Interest			\$13,508.72
12/31/2007	Loan Default Interest			\$14,184.64
1/31/2008	Loan Default Interest			\$14,436.81
Principal Transactions (last 90 days)				

Full Account Summary

Account:	
Total Loan Balance	Default IR%
\$713,460.06	20.00%
Account Notes:	

Wiring Instructions

USA Capital Diversified Trust Deed Fund
Bank of America

Routing No. 111000012

Account No. 3755532451

Reference Loan # 184

EXHIBIT B

EXHIBIT B

From: Harvick, Chas
Sent: Tuesday, October 23, 2007 12:13 PM
To: Robert Russell
Cc: Tucker, Michael; Hermann, Jeffery
Subject: ICC - Document Request/Follow-up

Mr. Russell,

Thank you for taking the time to meet with Michael and me last week. As requested, provided below is a document request list:

Unser Central Partners

1. Financials from inception to date
2. Operating agreement and amendments, articles of incorporation, etc.
3. Tax returns from inception to date
4. Audits from inception to date
5. Additional documents to help us understand the business purpose, past operations and status of the business

Interstate Commerce Center

1. Financials from inception to date
2. Operating agreement and amendments, articles of incorporation, etc.
3. Tax returns from inception to date
4. Audits from inception to date
5. Closing documents from the sale of collateral

Robert Russell

1. Current personal financials
2. Final report of personal bankruptcy including a copy of the \$1m judgment
3. Organizational chart of related entities

Russell/AD Development Group

1. Financials from inception to date
2. Operating agreement and amendments, articles of incorporation, etc.
3. Tax returns from inception to date
4. Audits from inception to date
5. Additional documents to help us understand the business purpose, past operations and status of the business

SVRB Investments LLC

6. Financials from inception to date
7. Operating agreement and amendments, articles of incorporation, etc.
8. Tax returns from inception to date
9. Audits from inception to date
10. Additional documents to help us understand the business purpose, past operations and status of the business

I look forward to receiving the requested documents and resuming our discussion regarding payoff/settlement of the Interstate Commerce Center obligation.

Regards,

Chas Harvick

Corporate Finance

FTI

602.744.7186 direct

602.524.0069 cell

602.744.7110 fax

chas.harvick@fticonsulting.com

Two North Central Avenue

Suite 1200

Phoenix, AZ 85004

www.fticonsulting.com

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EXHIBIT C

EXHIBIT C

From: Harvick, Chas [mailto:Chas.Harvick@FTIConsulting.com]
Sent: Monday, November 12, 2007 8:35 AM
To: Robert Russell
Cc: Tucker, Michael; Hermann, Jeffery
Subject: RE: ICC - Document Request/Follow-up

Mr. Russell,

What is the status of producing documents in response to the request below?

Regards,

Chas Harvick
Corporate Finance
FTI
602.744.7186 direct
602.524.0069 cell
602.744.7110 fax
chas.harvick@fticonsulting.com

Two North Central Avenue
Suite 1200
Phoenix, AZ 85004
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EXHIBIT D

EXHIBIT D

From: Robert Russell [mailto:r.russell@industrialwest.com]
Sent: Monday, November 12, 2007 2:23 PM
To: Harvick, Chas
Subject: RE: ICC - Document Request/Follow-up

Within the week.

Bob

Robert A Russell
Industrial West Group
Russell/AD Development Group
8324 E Hartford Dr - Suite 110
Scottsdale, AZ 85255
480-505-4048 ext 203
480-505-4049 fax
480-747-5657 cell

EXHIBIT E

EXHIBIT E

From: Harvick, Chas
Sent: Tuesday, December 04, 2007 8:20 AM
To: 'Robert Russell'
Cc: Tucker, Michael; 'Hermann, Jeffery'
Subject: RE: ICC - Document Request/Follow-up

Mr. Russell,

Diversified has not received the requested documents you agreed to provide within two weeks after Michael and I met with you on October 19, 2007. Subsequently you indicated you would produce the requested documents within a week of November 12, 2007. During our meeting on October 19th we discussed exploring a resolution to the outstanding Interstate Commerce Center loan balance and your personal guarantee out of court to minimize your cost and time and Diversified's collection cost and time. Please produce the documents requested below to the address in my signature line by December 10, 2007. If the documents are not produced by December 10th Diversified will pursue other collection alternatives.

Regards,

Chas Harvick
Corporate Finance
F T I
602.744.7186 direct
602.524.0069 cell
602.744.7110 fax
chas.harvick@fticonsulting.com

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Suite 1200
Phoenix, AZ 85004
www.fticonsulting.com

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EXHIBIT F

EXHIBIT F

From: Tucker, Michael
Sent: Thursday, December 13, 2007 10:47 AM
To: 'Robert Russell'
Cc: 'Hermann, Jeffery'; Harvick, Chas
Subject: RE: ICC - Document Request/Follow-up

Bob: Your recent call to me stated that the documents would be in my possession already. I do not have any documents at this time. Please have them delivered to me today. You have our cards but my address again is below.

Michael Tucker
FTI Consulting, Inc.
Two North Central Ave. Suite 1200
Phoenix, AZ 85004
602 744 7144, Direct Dial
602 744 7110, Fax
602 619 7899, Cell
Email: michael.tucker@FTIConsulting.com